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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1019

MORRIS BERMAN

Appellant,

—vs.—

JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE, JOHN R. CREWS,* J. J. DUBERSTEIN,* Constituting the Board of Elections of the City of New York, et al.,

Appellee.

* Page 1.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

Statement as to Jurisdiction

MORRIS BERMAN

Pro Se

Box 115, New York, N. Y., 10001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

MORRIS BERMAN

Appellant,

—vs.—

JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE, JOHN R. CREWS,* J. J. DUBERSTEIN,** Constituting the Board of Elections of the City of New York, et al.,

Appellee.

* Resigned 1966.
** Term started 1966.

Appeal From the Court of Appeals of the State of New York

STATEMENT AS TO JURISDICTION

The Appellant, Morris Berman, a voter of the City of New York, appeals from the judgment of the Court of Appeals of the State of New York entered October 18, 1966, affirming the judgments of the courts below, which did not rule on the question of the constitutionality of a New York statute permitting voting in churches raised by said Appellant.

The Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The Court of Appeals, highest appellate court of the state, and the Appellate Division, First Department, of the state supreme court, rendered no opinions in affirming the judgment of the state supreme court, Special Term, Part 1, First Judicial District. The opinion and order of said Part I of the state supreme court, the court of original jurisdiction, is reported in New York Miscellaneous, Second Series, on Page 713 (1966), and a copy thereof is appended hereto as Appendix A. A memorandum of the Court of Appeals, referring to said opinion, appears in 18 N. Y. 2d 774 (Appendix B).

Statement on the Nature of the Case

Appellant was assigned a polling place in the 1964 state and federal election by the Appellee in a church operated building and in a room exhibiting religious symbolism, the viewing of which is not permitted by his religion (Appendix F); neither is state-imposed proselytising in compelling church [illegible] entry, even in absence of such symbolism. A change of voting and registration place was not permitted by the Appellee, and Appellant, presuming unconstitutionality of the state election law, brought an action for culpable negligence against said Appellee.

The court of original jurisdiction stated, in its opinion, that it did not assume the unconstitutionality of the state election law, and dismissed the complaint for insufficiency. This dismissal is understandable on the court's presumption of constitutionality, but since all elements of a complaint required by Rule 3014 of the state Civil Practice Act and Rules and Section 104 on Construction shown in Appendix E were complied with (complaint is shown on Pages 8 to 12 of the Record) and since the "inconsistency" allegation in the opinion was in error, and the basis for the damages, allegedly not shown, was stated in

allegation 8 of the complaint, a ruling of unconstitutionality by this Court should result in a reversal of the judgment on the constitutional issue and remanding to the state courts. As to alleged inconsistency in "voting" but not registering, there was neither, as the "voting" was not with due deliberation, owing to the strain of being involuntarily assigned to a place where symbolism, the viewing of which is prohibited by the Appellant's religion, was unexpectedly found after entering the polling place. The tort began with the assignment of a church as the Appellant's polling place, and the subsequent consequences arose from such unconstitutional polling place assignment by the Appellee. The Appellant was thus prevented from registering, and entered the building for voting only after he was led to believe no religious symbolism would be found.

The American Jewish Congress, in a brief *amicus curiae* in this case by *Stanley Geller, Leo Pfeffer* and associates requested the Appellate Division of the state supreme court to rule on constitutionality, but the state appellate courts failed to do so.

Dates of Judgments, Order and Notice of Appeal

The order of the court of original jurisdiction, the state supreme court, Part I, First Judicial District, was entered on February 25, 1966, and a judgment thereon entered March 22, 1966. This order and judgment were affirmed by the Appellate Division of the state supreme court, First Department, on June 30, 1966 and affirmed and entered by the state's highest court, the Court of Appeals, on October 18, 1966 at 2 P.M. Papers in the case were remitted to the state supreme court and filed with the clerk of New York County, where the notice of appeal was filed January 3, 1967 and amended January 16, 1967. The original notice of appeal, filed December 8th, 1966, was superseded by the notice of January 3, 1967.

Statutory Provision Sustaining Jurisdiction

The appeal is within the jurisdiction of the United States Supreme Court under Title 28 U.S. Code, Section 1257 (2), which provides that a final judgment or decree rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court of the United States as follows:

> "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Cases Sustaining Jurisdiction

Cases sustaining jurisdiction in this appeal are *Cantwell* v. *Connecticut,* 310 U.S. 96 (1940); *Engel* v. *Vitale,* 370 U.S. 421; *Everson* v. *Board of Education of Ewing Township,* 330 U.S. 1 (1947); *McGowan* v. *Maryland,* 366 U.S. 420 (1960) and *Sherbert* v. *Verner,* 374 U.S. 398 (1963).

State Statute the Validity of which is Involved

This case involves the validity of the election law of the State of New York, constituting Chapter 17 of the consolidated laws of the state. Sections 66 and 193 of said law indicate that churches may be used as polling places in general elections, which violates the Establishment, Free Exercise and Equal Protection clauses of the Constitution and the Civil Rights Act of 1964. New York is the only state in the union specifically including churches as permissible polling places in its election law. The pertinent portion of Section 66 of the law is appended in Appendix C, where the word "church" has been italicised.

Questions Presented

The following questions are presented by this appeal:

1. Whether Sections 66, 193 and other sections of the election law of the State of New York which specifically permit the use of churches as polling places in general elections violate the principle of the separation of church and state of the First Amendment to the United States Constitution and the free exercise clause thereof, made applicable to the states by the Fourteenth Amendment.

2. Whether under the Fourteenth Amendment guaranteeing citizens equal protection of the law and Section 101(2)(A) of the Civil Rights Act of 1964 a citizen of one religion may be compelled, if he wishes to exercise his voting franchise, to vote or register for voting in a church operated building of another religion into which he is not permitted to enter by laws or customs of his own religion, by reason of religious symbolism in the polling place of said building or other religious reason.

3. Whether under the First and Fourteenth Amendments to the U.S. Constitution the state may designate a church operated building as a polling place in a general state and federal election, said church being subsidized in part by the rental income paid by the state to said church for the polling place.

Manner, Method and Time of Raising Federal Questions Sought to be Reviewed

The questions of the violation of federal law were first brought before the court of original jurisdiction—the supreme court of the State of New York, by the Appellant in his Complaint (Record on Appeal, pp. 8, 9) in allegation 2:

> "That this action arises under Section 66 of the New York State Election Law, which governs the selection of polling places, and provides for voting in churches, contrary to: Amendment 1 of the U. S. Constitution, which requires the separation of church and state * * * and of the federal Civil Rights Act of 1964, which prohibits the denial of voting rights to qualified citizens. The selection of a given church by the State for all citizens in a locality to enter for voting purposes constitutes the establishment of a religion by the State in direct conflict with the First Amendment of the United States Constitution."

and in oral argument before that Court. The complaint was dismissed for alleged insufficiency.

In his brief (pp. 10-11) before the first appellate court, the Appellate Division of the Supreme Court, the Appellant cited *Everson* v. *Township of Ewing,* 330 U.S. 1 (1947), in which the prevailing opinion of the U. S. Supreme Court, by Mr. Justice Black, stated:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government * * * can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will * * *."

Before the same appellate court the Appellant cited *Engel* v. *Vitale,* 370 U.S. 421 at 429 (1962) in his Brief, in which Mr. Justice Black stated, in the opinion of the court:

> "* * * one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon * * * one particular form of religious services * * *."

Also, before the same court, the Appellant, in his Brief, Page 12, cited *Engel* v. *Vitale* (*supra*) at 437. Mr. Justice Douglas, concurring with the court's opinion, stated:

> "The point for decision is whether the Government can constitutionally finance a religious exercise. Our system at the federal and state levels is presently honeycombed with such financing. Nevertheless, it is an unconstitutional undertaking whatever form it takes * * *."

Appendix G shows a page of church polling places in New York City, having hundreds of such polling places, while there are none in Buffalo, the state's second largest city.

The unconstitutionality of state-imposed proselytising was discussed by the Appellant in allegation 5 of his complaint, Page 13 of his brief to the Appellate Division, and similarly in his Court of Appeals brief.

The application of the First Amendment to state laws as provided by the Fourteenth Amendment was stated before that court by the Appellant in citing *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), on Page 12 of his Brief.

The American Jewish Congress, in its brief *amicus curiae* to the same appellate court, cited *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and its application to religious freedom. In that case the appellant, a Seventh Day Adventist, was denied unemployment compensation on the ground that she refused to work on Saturday in a job she could perform. A state law barred her compensation. In concurring with the opinion of the Court written by Mr. Justice Brennan, Mr. Justice Douglas stated:

> "The result turns not on the degree of injury, which may indeed be non-existent by ordinary standards. The harm is with the interference with the individual's scruples or conscience—an important

area of privacy which the First Amendment fences off from the Government * * *."

The Civil Rights Act and Fourteenth Amendment were cited on Page 13 of the Appellant's brief. The Appellee in effect disqualified voters of religions other than that of the polling place church, whose religious scruples prevented them from entering, registering or voting, contrary to the Act.

That the right to religious freedom takes precedence over the right to commercial gain was established by the Sunday Closing cases, as *McGowan* v. *Maryland,* 366 U.S. 420 (1960) and cited by the Appellant in his Reply Brief at Page 22. In the instant case the financial gain to a church for polling place rentals cannot be held superior to the right of religious freedom of voters whose religious beliefs do not permit them to enter such churches or church controlled buildings.

In the Court of Appeals the above cases involving the First Amendment which were cited in the Appellant's brief to that Court were *Everson* v. *Board of Education* (*supra*) on Page 11 of the Brief, *Engel* v. *Vitale* (*supra*) on Pages 12 and 14 and *Cantwell* v. *Connecticut* (*supra*) on Page 13. The First and Fourteenth Amendments and the Civil Rights Act of 1964 (Appendix D) were cited on Page 13 of the Brief.

The indication by the court of original jurisdiction that the question of separation of church and state is one for appellate courts to determine, and the failure of the state appellate courts to decide on the constitutionality of the state election law, compelling voters to enter a church in some areas if they are not to be disenfranchised, bring this case within the statutory provision above stated to confer jurisdiction on the Supreme Court of the United States.

The Questions Are Substantial

The State of New York is the only one of the fifty in the United States which specifically permits the use of a church as a polling place, contrary to the U. S. Constitution and the federal statutes referred to. This appeal is in the nature of a test case of the legality of such church polling places, and is novel in that the question has never before been presented to a court for adjudication. Substantial questions of infringement of constitutional rights are involved, and probable jurisdiction of the Court is therefore indicated.

Respectfully submitted,

MORRIS BERMAN
Appellant Pro Se
Box 115, New York, N. Y., 10001

APPENDIX A

Order—Dated February 25, 1966

SUPREME COURT OF THE STATE OF NEW YORK,
SPECIAL TERM, PART I, NEW YORK COUNTY
at the Courthouse thereof, 60 Centre Street,
New York, 10007.

Present: HON. MITCHELL D. SCHWEITZER,
Justice

—against—

BOARD OF ELECTIONS, CITY OF N. Y., et al.

Upon the foregoing papers Defendants, the Commissioners of the Board of Election of the City of New York, move, pursuant to CPLR 3211, for dismissal of the complaint for legal insufficiency.

In the complaint, plaintiff seeks $100,000.00 damages, based upon the defendants' "culpable negligence", and treble that amount, based upon defendants' malice in designating a church as a voting and registration place. Plaintiff asserts that such a designation and its impact upon him, as an adherent of a different religion, caused him to fail to register in a party of his choice during the registration period prior to the November 1964 election. However, he did, according to his complaint, vote in that election, but claims that he was upset during that period. He claims that the designation constituted a violation of the constitutionally mandated separation of church and state; a deprivation of his right to freely vote, unhampered by sur-

rounding circumstances which affected his thinking and actions.

Plaintiff does not assert in his complaint, or specify in the papers submitted on this motion, the basis for the damages he claims he sustained. Inconsistency is revealed in his claim that the said designation of a church in effect prohibited his registration in a party, but did not prohibit his voting at the general election. Further, no basis apparently exists for his assertion that the respondents were guilty of culpable negligence or malice. Finally, and most compelling, is the fact that Section 66 of the Election Law mentions churches as among those specific places where registration and voting may be conducted. (See also 11 Op. State Compt. 172 (1955)).

While there may be, at least arguably, a basis for the claim of violation of the principle of separation of church and state, in respondents' actions, the instant action does not appear couched in terms proper to raise the question. Even were this court to consider that matter, it, as a court of original jurisdiction, would not assume the unconstitutionality of the law attacked.

The motion is accordingly granted and the complaint dismissed.

/s/ M. D. S.,
J. S. C.

APPENDIX B

Court of Appeals, 18 New York Reports, 2d Series P. 774

Memoranda

MORRIS BERMAN, Appellant, *v.* BOARD OF ELECTIONS OF THE CITY OF NEW YORK, et al., Respondents.

Argued September 19, 1966; decided October 18, 1966.

Elections—church as polling place—Special Term dismissed, for legal insufficiency, complaint wherein plaintiff sought to recover from Board of Elections and individual commissioners thereof damages allegedly sustained by him by reason of culpable negligence on part of defendants and triple damages for alleged malice on their part in designating church-operated building as place for registration of voters and holding of elections—complaint was properly dismissed.

Berman v. *Board of Elections of City of N. Y.*, 26 A D 2d 620, affirmed.

APPEAL, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered June 30, 1966, which unanimously affirmed (1) an order of the Supreme Court at Special Term (MITCHELL D. SCHWEITZER, J.; opinion 49 Misc. 2d 713), entered in New York County, granting a motion by defendants, the Board of Elections of the City of New York and the individual commissioners thereof, to dismiss the complaint for legal insufficiency and (2) the judgment entered thereon. The action was commenced to recover damages allegedly sustained by plaintiff by reason of culpable negligence on the part of defendants and triple damages for alleged malice on their part in designating a church-operated building as a place for the registration of

voters and for the holding of elections. The complaint alleged, in part, that in 1964 plaintiff was a qualified voter and a resident of the then 41st Election District of the Fourth Assembly District, New York County; that, although schools sufficient in number for utilization as polling places were located in the area, defendants designated a building controlled by St. George's Ukrainian Catholic Church as the polling place for plaintiff's election district, and that, as a result of defendants' abuse of discretion and culpable negligence in making this designation, plaintiff, an adherent of a religion other than that of the designated church, was unable to register without compromising his religious beliefs, voted but was unable to concentrate while doing so, was compelled to differentiate his religion publicly in a community where other religions predominated and lost opportunities to register with a party which represented his political views and to make personal connections that could have furthered his career and financial status. Special Term stated that plaintiff did not specify the basis for the damages he claimed to have sustained; that inconsistency was revealed in his claim that the said designation of a church in effect prohibited his registration in a party but did not prohibit his voting at the general election; that no basis apparently existed for his assertion of culpable negligence or malice on the part of defendants; that section 66 of the Election Law mentioned churches as among those specific places where registration and voting might be conducted, and that the action did not properly raise the matter of the constitutionality of said section.

Morris Berman, appellant in person.

J. Lee Rankin, Corporation Counsel (*Peter Linzer* and *Seymour B. Quel* of counsel), for respondents.

Order affirmed, without costs; no opinion.

Concur: Chief Judge DESMOND and Judges FULD, VAN VOORHIS, BURKE, SCILEPPI, BERGAN and KEATING.

APPENDIX C

Extract from Section 66 of the N. Y. State Election Law

§ 66. Designation of places for registry and voting

1. On the third Tuesday of August in each year, or within the period of thirty days immediately prior thereto, the board or body empowered by this chapter to create or alter the election districts of a city or town shall designate the place in each election district in the city or town at which the meetings for the registration of voters and the elections and primaries shall be held during the year following the ensuing first day of October. No place shall be so designated in which there is located any business licensed under the provisions of the alcoholic beverage control law. A list of the places so designated shall be filed in the office of the board of elections. In a city or town the place so designated, if a schoolhouse, *church*, library or other public building, or a portable voting house, may be in a contiguous election district. Wherever any election district contains less than fifty registered voters and is less than one square mile in area, the place so designated may be the designated polling place in a contiguous election district.

APPENDIX D

Civil Rights Law of 1964

TITLE I—VOTING RIGHTS

Sec. 101. * * *

"(2) No person acting under color of law shall—

"(A) in determining whether any individual is qualified under State law or laws to vote in any Federal election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote; * * *."

APPENDIX E

N. Y. Civil Practice Act and Rules

§ 104. Construction (1964)

The civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding.

R 3014. Statements.

Every pleading shall consist of plain and concise statements in consecutively numbered paragraphs. Each paragraph shall contain, as far as practicable, a single allegation. Reference to and incorporation of allegations may subsequently be by number. Prior statements in a pleading shall be deemed repeated or adopted subsequently in the same pleading whenever express repetition or adoption is unnecessary for a clear presentation of the subsequent matters. Separate causes of action or defenses shall be separately stated and numbered and may be stated regardless of consistency. Causes of action or defenses may be stated alternatively or hypothetically. A copy of any writing which is attached to a pleading is a part thereof for all purposes.

APPENDIX F

The Jewish Press
July 16, 1965

Voting Booths in Churches

* * * In many areas of our city, during registration and elections, churches and synagogues are used for voting purposes.

In some areas, schools, barber shops, candy stores or any place in a community * * * most convenient to the public is utilized.

* * * We have been told that many voters in certain areas, rather than enter a church, have given up their right to vote. In other cases, those who realized the voting would be held in a church have sent away for absentee ballots, explaining they would be out of town on Election Day. Of course, this was one way of settling the problem —but, not the right way.

We realize that pulling voting booths out of churches and synagogues will affect the finances of these institutions, but, we also feel no amount of money should sell our right of separation of church and state, especially when it is against the religious belief of the voter to enter a church.

Compilation of Jewish Laws and Customs
(From the Shulchan Aruch)

5. It is forbidden to look (in admiration) at idols and their ornaments, for it is written (Leviticus 19:4): "Ye shall not turn to idols." One must keep away from a house of idolatry, and especially from the idol itself, a distance of at least four cubits.* * *

Entering A Church
(By Rabbi Sholom Klass, in the Jewish Press)

Entering a church for any purpose other than absolute necessity is forbidden.* * *

APPENDIX G

Page of a List of Church Polling Places in New York City Used for Registration and General Election 1964 considered by the State Appellate Courts

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Names	*Location*	*Rental*
Church of Epiphany	1393 York Ave.	$ 99.00
St. Monica Church	413 E. 79th St.	231.00
St. Joseph Church	404 E. 87th St.	132.00
St. Thomas Church	262 W. 118th St.	198.00
St. Rose of Lima Church	510 W. 165th St.	132.00
Our Lady of Lourdes Church	472 W. 142nd St.	165.00
Holy Rood Church	715 W. 179th St.	297.00
K'Hal Adath Jeshurun	90 Bennett Ave.	99.00
St. Mathew Lutheran Church	202 Sherman Ave.	165.00
St. Stephen Church	144 W. 228th St.	132.00
Our Lady of Mt. Carmel	2234 1st Avenue	66.00
St. Paul Church	114 E. 118th St.	132.00

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Appellees.

* Resigned 1966
** Term started 1966

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF AS TO JURISDICTION OF THE NATIONAL INFORMATION BUREAU FOR JEWISH LIFE, INC. AS AMICUS CURIAE

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF AS TO JURISDICTION OF THE NATIONAL INFORMATION BUREAU FOR JEWISH LIFE, INC. AS AMICUS CURIAE

Interest of the National Information Bureau for Jewish Life, Inc.

This brief is filed with the consent of the parties. The National Information Bureau for Jewish Life, incorporated in 1965 under the membership corporation law of the State of New York, is a non-profit, non-partisan organiza-

tion having a nation wide membership including persons of various religious views and sects, predominantly of the Jewish religion and citizens of the State of New York. It is devoted to informing the general public on Jewish ideals and the accomplishments of American Jews in government and the professions. The president of the organization is the director of community relations in a Hebrew institution of learning and is also an editor of the Jewish Press, the editorial of which, in the Appellant's Jurisdictional Statement, advocates the separation of church and state with respect to church voting. The honorary national president is a member of the United States Congress from New York, and the advisory board includes members of Congress and of the judiciary, the latter not being associated with discussions on this brief. Among officers and directors, including the president, are rabbis of doctoral rank who are leaders in American Jewish life. In 1965 the outstanding achievement award of the organization was presented to a legal adviser to the President by the Vice President of the United States. It is in the interest of the *amicus curiae* to preserve Jewish institutions as well as religious freedom granted by the Establishment Clause, now denied its members through compulsory church voting.

It should be clearly understood that in filing this brief the *Amicus Curiae* does not, expressly or by implication, reflect on the principles or practices of any religious organizations, regardless of denomination. The sole concern in this brief is in connection with the informational aspect of the organization in stating the ideals and customs of the Jewish people in showing that the Court has jurisdiction in its function of interpreting the Constitution.

Statement of the Case

The Appellant in this case, assuming the unconstitutionality of Section 66 of the New York State election law, permitting church voting, instituted an action in tort in the state courts for culpable negligence on the part of the New York City board of elections in assigning a church-operated building containing religious symbolism as a polling place for said Appellant in the 1964 state and federal election. The action was started following the refusal of said board to change Appellant's polling place to a secular building, and to cover the religious symbolism during the Appellant's voting when requested to do so. The following year the Appellant was again assigned a church building for registration purposes.

The state supreme court stated in its order it did not, as a court of original jurisdiction, wish to assume the unconstitutionality of the election law, and the state appellate courts rendered no opinions.

POINT I

Section 66 of the State Election Law Violates the Principle of Religious Freedom.

In the Harvard Law Review, Volume 75, 306, Mr. Justice Silberg of the Supreme Court of Israel, in distinguishing religious law from secular law, stated:

> "Jewish law does not confine itself to relations between man and man, but in addition, * * * between man and G—d."

For centuries the admonition against both viewing of strange religious symbolism and, by custom, entry into strange churches, has been law to the religious denomination of the Appellant, which the State has made difficult to observe

if voters are not to be disenfranchised, much as the Soviet Union has made religious observance difficult through withholding of various religious rights and privileges previously enjoyed by its people. Religious freedom is essential for the continuance of religious faith by succeeding generations, and the unhampered continuance of religious custom is essential for such continuance.

That the Court has jurisdiction in this case is confirmed by these cases involving the Establishment Clause: *Abington Township* v. *Schempp*, 374 U.S. 203 (1963); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948) and *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

The establishment of a church in a community by the state for voting by all religious faiths is a serious violation of the Establishment Clause, resulting in proselytising by the state, as distinguished from non-governmental agencies (*Cantwell* v. *Connecticut, supra*). In the case of *Sherbert* v. *Verner* (*supra*) cited by the American Jewish Congress as *amicus curiae* in this case before a state appellate court, Mr. Justice Douglas wrote, in referring to the Establishment Clause:

> "The harm is with the interference with the individual's scruples or conscience—an important area of privacy which the First Amendment fences off from Government."

POINT II

The Determination of Constitutionality is Essential

As the Appellant has stated in his Jurisdiction Statement:

> "This dismissal (of the complaint for insufficiency) is understandable on the court's presumption of constitutionality of the state election law . . ."

Unlike *Peters* v. *Hobby*, 349 U.S. 331 (1955), wherein the constitutional question did not have to be reached, the determination of constitutionality is the essence of the instant case, which is a test case of the constitutionality of a state law. If the law were considered by the Appellant to be constitutional he would not have brought this action. As already indicated, the elements of a sufficient complaint (based upon unconstitutionality) were present, and dismissal of the complaint was in error.

We respectfully submit that the Court has jurisdiction in this case.

Respectfully submitted,

THE NATIONAL INFORMATION BUREAU FOR JEWISH LIFE, INC.,
Amicus Curiae
MASON HAMPTON, JR.
Counsel

SUPREME COURT, U. S.

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APPELLANT'S REPLY BRIEF AS TO JURISDICTION

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF AS TO JURISDICTION

Statement

This reply brief as to jurisdiction constitutes the Appellant's reply to the Appellee's motion to dismiss the appeal on the ground that the judgment rests on an adequate non-federal basis. It will be shown that the state's highest court rested its judgment on a *federal* basis, as indicated in the amended remittitur of that court.

Amended Remittitur—Federal Questions Decided

On March 2, 1967 the Court of Appeals of the State of New York, the state's highest court, rendered the following decision on Motion No. 311 in the instant case:

> "Motion to amend the remittitur granted; * * * Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Appellant contended that Section 66 of the Election Law insofar as it authorized the designation of a church as a voting place is in violation of the First and Fourteenth Amendments to the Constitution of the United States. The Court of Appeals held that appellant's constitutional rights were not violated."

Non-Federal Questions Not in Issue

Since the Court of Appeals would not have reached the constitutional questions if it could have affirmed on non-constitutional grounds (*Lynch* v. *New York* ex rel. *Pierson* (1934) 293 U. S. 52, 54-55), it is assumed that all of the elements of a complaint in tort were presented in the complaint and were in compliance with the New York Civil Practice Law and Rules. There was no valid reason for affirmance on non-federal grounds as alleged by the Appellee's counsel in his motion to dismiss, which quoted portions of an order of the court of original jurisdiction. A statement showing compliance with the New York civil practice in the complaint in the instant case is given in the Appellant's Jurisdictional Statement and in the following Argument, where figures in parentheses refer to pages in Appellee's Motion to dismiss before this Court:

POINT I

Non-federal grounds were inadequate to support the judgment.

It has already been shown in the Appellant's Jurisdictional Statement that the non-federal grounds stated in the order of the court of original jurisdiction were not in accordance with New York civil practice. For example, inconsistency in the complaint (6) was cited and shown to be unwarranted in fact in the Jurisdictional Statement; but in addition, Rule 3014 of the Civil Practice Law and Rules (Appendix E of the Jurisdictional Statement) states:

> " * * * Separate causes of action or defenses may be stated, *regardless of consistency* * * *."

Appellee states there was no allegation for the basis for damages (6), yet Complaint Paragraph 8 alleges such basis clearly; that there was no basis for the assertion of culpable negligence or malice (6), but on the assumption of unconstitutionality of Section 66 of the election law and the Affidavit the assignment of a church-operated building containing religious symbolism prohibited to be viewed by the Appellant and the unwillingness of Appellee's representative to cover same did, in fact, constitute both culpable negligence and malice; that "the instant action does not appear couched in terms proper to raise the (constitutional) question" (6), but in amending the remittitur (above Statement) the Court of Appeals has in effect ruled that such constitutional questions were properly raised.

Compensatory damages allegedly asked by Appellant as stated on Page 2 of Appellee's motion to dismiss could be erroneously interpreted as quadrupled, though unambiguously stated on Page 3 of said motion. The Appellee's motion to dismiss in the court of original jurisdiction made a fuller consideration of damages difficult, and the jurisdiction of this Court does not generally extend to the assessment of damages.

STERN AND GRESSMAN, *Supreme Court Practice* (1962) states (P. 106):

> "It is established law that this Court is not fully concluded by the state court's determination as to the sufficiency of pleadings asserting a federal right."

POINT II

The State's highest Court passed upon constitutional issues.

In its amendment to the remittitur (Statement above) the state's highest court ruled that it had passed upon constitutional issues and held that the appellant's constitutional rights were not violated, which ruling is now being appealed in this Court.

POINT III

Inseparability of federal and non-federal grounds confers jurisdiction.

> "Where the non-Federal ground is so interwoven with the other (federal) as not to be an independent matter * * * our jurisdiction is plain" (*Enterprise Irrig. Dist.* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164).

In the instant case the constitutional issue is so interwoven with and inseparable from the non-federal questions that the Court's jurisdiction is apparent.

CONCLUSION

In view of the amended remittitur which shows the consideration of the federal questions on appeal before the state's highest court, the court having reached the constitutional issue and thus having recognized the validity of the non-federal portions of the Complaint, and in view of the inseparability of the federal and non-federal issues in this case, it is respectfully submitted that probable jurisdiction is conferred upon this Court.

Respectfully submitted,

MORRIS BERMAN,
Appellant Pro Se,
Box 115,
New York, N. Y., 10001

March 9, 1967

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(38669)

IN THE

Supreme Court of the United States

October Term, 1966

No. 1019

MORRIS BERMAN,

Appellant,

-vs.-

JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE, JOHN R. CREWS, J. J. DUBERSTEIN, Constituting the Board of Elections of the City of New York, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

J. LEE RANKIN,
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STANLEY BUCHSBAUM,
PETER LINZER,
of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 1019

MORRIS BERMAN,

Appellant,

-vs-

JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE, JOHN R. CREWS, J. J. DUBERSTEIN, Constituting the Board of Elections of the City of New York, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal be dismissed on the ground that the judgment rests on an adequate non-federal basis.

Statement

This is an appeal from a final order of the Court of Appeals of the State of New York, dated October 18, 1966, affirming an order of the Appellate Division of the Supreme Court of the State of New York, First Department, entered June 30, 1966, which in turn affirmed (1) an order

of the Supreme Court of the State of New York granting appellees' motion to dismiss the complaint for legal insufficiency and (2) the judgment entered thereon.

Both the Court of Appeals, 18 N Y 2d 774, and the Appellate Division, 26 A D 2d 620, affirmed unanimously and without opinion. The only opinion in the action was that of the court of original jurisdiction, Supreme Court, New York County, 49 Misc 2d 713, reprinted as Appendix A to appellant's jurisdictional statement. That Court held that the complaint was legally insufficient on several non-constitutional and non-federal grounds. In referring to the constitutional ground now alleged by appellant the Court stated that "the instant action does not appear couched in terms proper to raise the question." 49 Misc 2d at p. 714. It added that, even if it were to consider that matter, it would not, as a court of original jurisdiction, assume the unconstitutionality of the law attacked (*id.*)

The Pleadings

This is a tort action for $400,000 damages allegedly caused by the "culpable negligence" (10-11)* and "malice" (12) of appellees, the Commissioners of the Board of Elections of the City of New York.

The complaint alleges that in 1964 plaintiff was a qualified voter, living in the then 41st Election District of the 4th Assembly District, New York County (8). A "church-controlled building," elsewhere described as a meeting hall owned by St. George's Ukrainian Catholic Church

* Numbers in parentheses refer to pages in the Record on Appeal in the Court of Appeals of the State of New York.

(15), was designated by defendants as the polling place for plaintiff's election district (9), as authorized by Section 66 of the Election Law (8). A crucifix was displayed in the meeting hall (9). Plaintiff admitted voting in the 1964 general election, but alleged that he took less time to vote than he normally did (10-11). He further alleged that he had intended to change his party designation when registering in October, 1964, but was unable to do so, thereby losing "personal connections [which] could have resulted in assistance in obtaining professional engineering work at a later date of substantial financial value * * *" (11-12).

Plaintiff also alleged that "as a result of the defendants' abuse of discretion and culpable negligence the plaintiff was deprived of his vote," although he did in fact vote in the 1964 general election; and that, because his religious obligation required him to cover his head in a religious building, he was compelled "to differentiate his religion publicly," although "he will find it difficult thereafter to determine to what extent such difference has militated against him" (10-11).

As already noted, plaintiff sought $100,000 damages for the "culpable negligence of the Defendants, and triple damages for malice on the part of said Defendants." The culpable negligence was based upon the defendants' "exercising their discretion in that they selected a church-controlled building" instead of one of the schools alleged to be in the neighborhood (9).

> "There was culpable negligence on the part of the Defendants in so selecting, as the question of the separation of church and state had come up before the Board on various occasions, and by devious means they had denied rights" (9-10).

There was also an allegation that defendants had subjected plaintiff "to influences of religious conversion" (10), and that a newspaper editorial, supplied with the complaint (15), "indicates such devious means used, constituting culpable negligence" (10). The complaint also contained the following paragraph:

> "6. That since the religion of the Plaintiff had not been officially revealed on the public records of the Defendants, the violation of the first amendment of the Constitution could have been inferred by the Defendants, which could not have assumed that all registrants and voters were of the faith of the church operating the polling place." (10)

There were no other allegations of culpable negligence, abuse of discretion or malice on defendants' part. Indeed, the word "malice" appears only in the demand for judgment, where it is used as the basis of a treble damage claim.

Along with his complaint, plaintiff submitted an affidavit (5-7) to which were attached a map (13), a copy of an unofficial registration sign that had been posted in his building (14), copies of newspaper clippings (15) and several photographs showing a crucifix, three signs and two scenes of election signs said to have been posted at public schools in the neighborhood (16).

Plaintiff's affidavit states that the 1964 polling place for his then election district was at 33 East 7th Street (3-4); that the building at that address was controlled by Saint George's Ukrainian Catholic Church, and that plaintiff, an orthodox Jew,

> "was not apprised of the church control of the premises * * * until October, 1964, though he may have voted from such premises before that date without having been apprised of such church occupancy. * * *" (4).

The affidavit also alleges that plaintiff unsuccessfully sought to be assigned to another polling place, but was told by the Board of Elections that a court order was necessary; that plaintiff sought "to inspect the polling place for religious symbolism" prior to the general election, but found the building closed, and that plaintiff discovered, on Election Day, 1964, a crucifix within the building plus two signs outside the building indicating occupancy by "groups under religious auspices" (apparently the Catholic War Veterans and the Boy Scouts, see Exhibit "E" [16]) (4-5).

The affidavit then states that a policeman and the Board of Election representative refused plaintiff's request to cover the crucifix and that plaintiff then voted, keeping his hat on. The affidavit asserts that "the choices he made on the voting machine were not his full, true, reasoned choices made after reasonable deliberation" (5-6).

ARGUMENT

The judgment appealed from rests on an adequate non-federal ground.

This is not an injunction proceeding, an action for declaratory judgment or a proceeding against a body or officer under Article 78 of the New York Civil Practice Law and Rules. It is a tort action alleging money damages

because of the administrative acts of the Board of Elections of the City of New York.

The opinion rests on four non-constitutional grounds: no allegation giving a basis for damages; inconsistency in the claim; no basis for the assertion of culpable negligence or malice; and statutory authority for defendants' acts. The court of original jurisdiction specifically says that "the instant action does not appear couched in terms proper to raise the [constitutional] question." 49 Misc 2d at 714.

It is a basic principle of this Court's procedure that appeal does not lie if the decision below rests upon an adequate non-federal ground. *Murdock* v. *City of Memphis,* 20 Wall. (87 U. S.) 590 (1874). The appeal must still fail because there are several non-federal grounds—insufficiencies in pleading—each of which is sufficient to sustain the judgment appealed from. *Fox Film Corp.* v. *Muller,* 296 U. S. 207 (1935). See STERN & GRESSMAN, *Supreme Court Practice,* Sec. 3-31 (3d Ed., 1962), pp. 105-106.

Moreover, this Court has declined to hear appeals from affirmances without opinion unless the appellant can show affirmatively that the non-federal ground is inadequate to support the judgment. *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52, 54-55 (1934). See STERN & GRESSMAN, *op. cit. supra,* Sec. 3-32 (c), p. 108.

No attempt has been made by appellant to amend the remittitur of the Court of Appeals of the State of New York to clarify the grounds of its decision. *Lynch* v. *New*

York ex rel. Pierson, supra, 293 U. S. at p. 55; *Herb* v. *Pitcairn,* 324 U. S. 117, 128 (1945). See STERN & GRESSMAN, *op. cit. supra,* Sec. 3-29, pp. 102-104.

Neither the "Statement as to Jurisdiction" of appellant nor the "Brief as to Jurisdiction" of the *amicus curiae* makes any reference to the non-federal grounds relied on by Special Term. Nor does either brief make reference to Special Term's explicit statement that "the instant action does not appear couched in terms proper to raise the [constitutional] question." 49 Misc 2d at p. 714.

CONCLUSION

The appeal to this Court from the judgment of the Court of Appeals of the State of New York should be dismissed.

February 24, 1967.

Respectfully submitted,

J. LEE RANKIN,
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Attorney for Appellee,
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New York, New York 10007.

STANLEY BUCHSBAUM,
PETER LINZER,
of Counsel.

SUPREME COURT, U. S.
APR 21 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1019

MORRIS BERMAN,

Appellant,

—vs.—

BOARD OF ELECTIONS OF THE CITY OF NEW YORK, *et al.*

JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE, JOHN R. CREWS,* J. J. DUBERSTEIN,** *Commissioners,*

Appellee.

* Resigned 1966
** Term started 1966

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION OF APPELLANT FOR REHEARING

MORRIS BERMAN,
Appellant, Pro Se,
P. O. Box 115
New York, N. Y. 10001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1019

MORRIS BERMAN,

Appellant,

—VS.—

BOARD OF ELECTIONS OF THE CITY OF NEW YORK, *et al.*

JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE, JOHN R. CREWS,* J. J. DUBERSTEIN,** *Commissioners,*

Appellee.

* Resigned 1966
** Term started 1966

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION OF APPELLANT FOR REHEARING

Statement

This petition of the appellant for a rehearing, under Rule 58 of the Court, withdraws consideration of Questions 2 and 3 of the questions presented in the Jurisdictional Statement in order to retain the form of pleading as an Appeal, and the petition will address itself to Question 1, relating to the constitutionality of a state law. It is understood that portions of the Jurisdictional Statement referring to Questions 2 and 3 are not requested to be considered by the Court.

New Matter Presented

With this petition two questions presented have been eliminated from present consideration, as indicated in the Statement, and facts are added, not previously known to the Appellant, relating to the absence of church voting in other jurisdictions, and statements of religious authorities in various jurisdictions emphasizing the importance of religious liberty as related to such church voting.

The United States Unique as to Church Voting

Statements received from official sources of England, France and Germany indicate the absence of voting in churches in these countries. Since both the official church and the state are headed by the same person in England, voting in churches might be anticipated in that country, but authoritative sources do not indicate such church voting. The president of the *Rabbinical Alliance of America*, representing six hundred orthodox rabbis in the United States, when informed of this petition for a rehearing, expressed his fervent hope that religious freedom would prevail.

Time Extension

The Court is respectfully requested, in accordance with Rule 58, to extend the time for the filing of this petition 30 days to permit the filing of an addendum as to voting practices in other jurisdictions to indicate to what extent the principle of the separation of church and state is in effect in such jurisdictions as to church voting, as a matter of Comparative Law.

Conclusion

This Court has consistently been concerned with religious freedom, as shown in the Jurisdictional Statement. In view of voting practices in the western world as above indicated, and of American public policy, and in view of the removal from consideration of issues other than those decided by an Appeal, the Court is respectfully petitioned to reconsider its decision and to allow argument.

Certificate Under Rule 58

The Appellant hereby certifies that this petition for a rehearing is presented in good faith and not for delay, and is restricted to the grounds above specified.

Respectfully submitted,

MORRIS BERMAN,
Appellant, Pro Se,
P. O. Box 115
New York, N. Y. 10001

April 20, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

BERMAN *v.* BOARD OF ELECTIONS, CITY OF NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 1019. Decided March 27, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.